IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.285 OF 2006

The Commissioner of Central Excise)
Mumbai III, Vardaan Trade, Sankul,)
4th Floor, MIDC, Thane (W) - 400 406.)..Appellant.

V/s.

M.M.Thakkar & Sons, Hanuman Silk)
Mills Compound, Kanjur Marg,)
Mumbai - 400 078.)..Respondent.

Mr.P.S.Jetly, Advocate with Ms.Anamica Malhotra i/b. H.P.Chaturvedi for appellant.

Mr.P.V.Patankar, Advocate with Mr.Pushkar P. Patankar for respondent.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 18TH OCTOBER, 2007.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. The Commissioner of Central Excise, Mumbai III has filed this appeal under section 35G of the Central Excise Act, 1944 dated 21/2/2006 in appeal No. E/3382/03-Mum. The appeal is admitted on the following reframed question of law :-

> " Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the Commissioner has not recorded satisfaction regarding the legality and propriety of the order appealed against as required under section

35E(2) of the Central Excise Act, 1944 and, therefore, the Commissioner (A) was justified in dismissing the appeal filed by the revenue ?

2. By consent of both the parties, the appeal is taken up for final hearing.

3. In this case, a show cause notice was issued to the respondent on 3/4/1996 calling upon them to show cause as to why Modvat credit of additional duty of excise leviable under Additional Duties of Excise (Goods of Special Importance) Act, 1957 availed by them to the tune of Rs.1,07,554/- should not be disallowed / reversed or recovered under Rule 57 I of the Central Excise Rules, 1994 read with section 11A of the Central Excise and Salt Act, 1944. After hearing the respondent, the Assistant Commissioner of Central Excise by his order in original dated 18/1/2002 dropped the show cause notice.

4. The Commissioner of Central Excise was of the opinion that the respondent was not entitled to the Modvat credit and, therefore, by an order dated 17th March, 2003 passed under section 35 E(2) of the Central Excise Act, 1944 authorised the Assistant / Deputy Commissioner of Central Excise to file an appeal before the Commissioner of Central Excise (A) against the

order in original dated 18/1/2002. Accordingly, an appeal was filed by the revenue before the Commissioner of Central Excise (A).

5. The Commissioner of Central Excise (A), however, without going into the merits of the case, dismissed the appeal by his order dated 29/7/2003 only on the ground that the Commissioner while directing the concerned authority to file an appeal against the order in original dated 18/1/2002 has not used the words ‘not legal and proper’ in his authorisation order and, therefore, it cannot be said that he had formed any opinion and in the absence of such opinion, the appeal filed by the concerned officer was not maintainable.

6. On further appeal filed by the revenue, the Tribunal by its order dated 21st February, 2006 upheld the order of Commissioner of Central Excise (A) by holding that the Commissioner had not recorded satisfaction as required under section 35 E(2) and, therefore, the appeal filed by the revenue was not maintainable. Challenging the aforesaid order, the revenue has filed the present appeal.

7. Mr.Jetly, learned counsel appearing on behalf of the revenue submitted that under section 35E(2) of the Excise Act while authorising appeal

against the order in original, it was not mandatory for the Commissioner to use the words "not legal and proper" What is relevant under section 35E(2) is that on being satisfied himself that the order in original is not legal and proper, the Commissioner can authorise filing of the appeal. In the present case, the order passed by the Commissioner clearly shows application of mind and his satisfaction regarding the legality of the order in original and, therefore, the appeal filed pursuant to the direction of the Commissioner could not be dismissed on the ground that the satisfaction has not been recorded by the Commissioner.

8. Mr.Patankar, learned counsel appearing on behalf of the respondent on the other hand relied upon the Judgment of the Apex Court in **Collector of Central Excise, Vadodara V/s. Rohit Pulp Paper Mills** reported in **1998 (101) E.L.T. 5 (S.C.)** and submitted that where the Commissioner does not record in his order that the order in original is not legal and proper, it cannot be said that the Commissioner had formed an opinion to that effect and consequently, the appeal filed against such order would not be maintainable.

9. We have carefully considered the rival submissions. Section 35E(2) of the Central Excise Act, 1944 reads as under:-

> " 35E(2) - The (Commissioner of Central Excise) may, of his own motion, call for and examine the records of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any decision or order and may, by order, direct such authority to apply to the Commissioner (Appeals) for the determination of such points arising out of decision or order as may be specified by the (Commissioner of Central Excise) in his order. "

10. Section 35E(2) of the Central Excise Act empowers the Commissioner to pass an order authorising filing of an appeal against an order passed by an authority subordinate to him, on his being satisfied that the order of the subordinate authority is not legal and proper. The order passed by the Commissioner under section 35E(2) of the Excise Act must reflect the satisfaction arrived at by the Commissioner.

11. In the present case, the Commissioner after perusing the order in original dated 18/1/2002 has inter alia recorded as follows :-

> " Rule 57C of Central Excise Rules, 1944 it is very clear that no credit of duty paid on inputs used in or in relation to the manufacture of final product whether directly or indirectly or whether contained in the final products or not shall be allowed if the final product is exempt from the whole of duty of excise levied thereon or is charged to nil rate of duty.

> Since in the instant case, the assessee paid nil rate of duty availing exemption under Notification No.1/93 dt. 28.2.93 in respect of stiffened cotton fabrics falling under chapter 2901.10 the modvat credit availed in respect of processed cotton fabrics used in the manufacture of stiffened cotton fabrics is not correct as per Rule 57C of Central Excise Rules, 1944.
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> In view of the above the adjudicating authority should have confirmed the charges mentioned in the Show Cause Notice.
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> I, therefore, in exercise of power vested in me under Section 35E(2) of Central Excise Act, 1944 direct the Assistant / Deputy Commissioner, Central Excise, Kanjurmarg Dn. Mumbai-III Commissionerate to file an appeal before the Commissioner (Appeals), Central Excise, Mumbai-III by following the procedure as laid down under Rule 4 of the Central Excise (Appeals) Rules, 2001."

Thus, the Commissioner has recorded reasons as to why the order in original, in his opinion, is erroneous and accordingly authorised filing of an appeal. When the Commissioner has recorded specific reasons for not accepting the findings given in the order in original, both the Commissioner (A) as well as the Tribunal were not justified in holding that the Commissioner has not recorded his satisfaction as contemplated under section 35E(2) of the Central Excise Act.

12. Reliance placed by the counsel for the respondents on the decision of the Apex Court in the

case of Rohit Pulp Paper Mills (supra) is wholly misplaced. In that case, the finding recorded by the Tribunal was that the Collector of Central Excise had simply authorised the Superintendent to file an appeal without application of mind. Thus, in that case, apart from authorisation there was no other material on record to suggest that the Collector had come to the conclusion that the order against which appeal was authorised was not legal and proper. Moreover, before the Apex Court the revenue failed to furnish noting, if any, maintained by the Collector recording reasons for not accepting the decision of the lower authority. In those circumstances, the Apex Court held that in the absence of any material to show that the Collector was satisfied that the order of the lower authority was not legal and proper, the authorisation was invalid and consequently, the appeal filed by the revenue was invalid. In the present case, the Commissioner has given detailed reasons as to why the order in original was not acceptable. Therefore, reliance placed on the decision of the Apex Court in the case of Rohit Pulp Paper Mills is totally misplaced.

13. Neither section 35 E(2) of the Central Excise Act mandates that the Commissioner in his order must use the words ‘not legal or proper’ nor the Apex Court in the case of Rohit Pulp Paper Mills (supra) has

held that in every authorisation order the words 'not legal and proper' must be used. It is not the words but the substance that matters. Therefore, even though the order passed under Section 35E(2) does not use the words 'not legal and proper' where it is shown from the reasons recorded that the Commissioner has applied his mind and for the reasons stated in the order has authorised filing of an appeal, then such an order would be in accordance with the provisions of Section 35E(2) of the Central Excise Act. In the present case, the commissioner has recorded reasons as to why the order passed by the lower authority was not acceptable. Therefore, the Commissioner (A) as well as the Tribunal were in error in holding that there was no compliance of Section 35E(2) of the Central Excise Act.

14. In this view of the matter, we answer the question framed above in the negative, that is, in favour of the revenue and against the assessee.

15. Accordingly, the appeal is allowed with no order as to costs and the matter is restored to the file of the Tribunal for decision on merits and in accordance with law.

(F.I.REBELLO, J.)

(J.P.DEVADHAR, J.)